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Supreme Court of the United States
OCTOBER TERM, 1944

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No. 793

JOSEPH F. MAGGIO,

Petitioner,

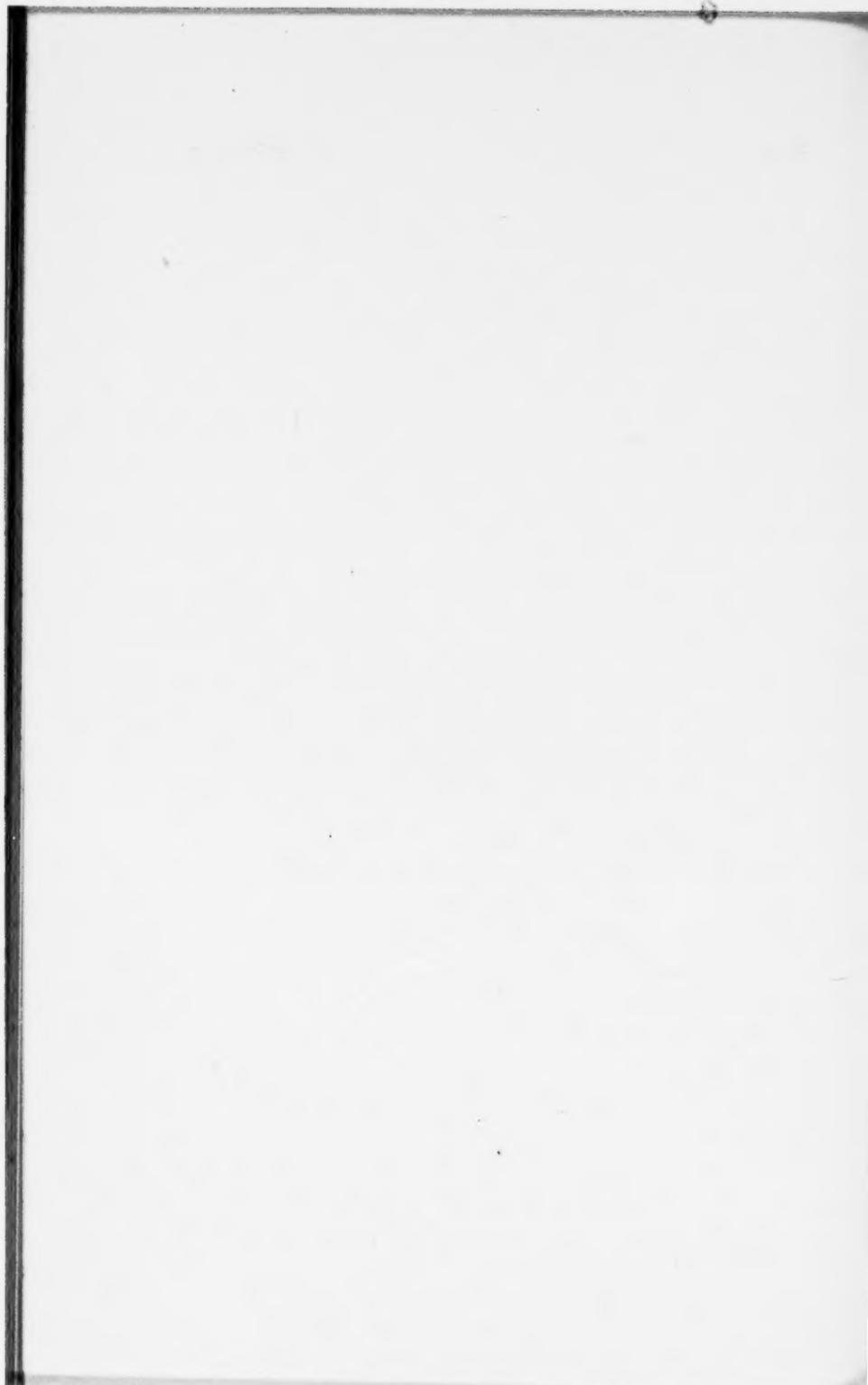
vs.

RAYMOND ZEITZ, as Trustee in Bankruptcy of
Luma Camera Service, Inc.,

Respondent.

BRIEF ON BEHALF OF TRUSTEE-RESPONDENT
IN OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH GLASS,
BENJAMIN H. WICKSEL,
Counsel for Respondent.



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BRIEF ON BEHALF OF TRUSTEE-RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petition herein closely parallels the petition in *Jeskowitz v. Carter*, No. 658, in which certiorari was denied by this Court on December 11, 1944, and in which a petition for rehearing was denied on January 2, 1945. No reasons are set forth in the present petition to induce a review of the turnover order which were not urged in *Carter v. Jeskowitz*. Counsel for the respondent herein was counsel for the respondent in *Carter v. Jeskowitz*. No useful purpose would be served by now restating the arguments contained in the respondent's brief in *Carter v. Jeskowitz*.

In view of the denial of the petition for a writ of certiorari in *Carter v. Jeskowitz*, there would be no occasion for an answering brief herein were it not for certain unwarranted factual arguments contained in the petition. These will be briefly considered.

Petitioner contends that the starting inventory figure used as a basis for determining the shortage was incorrect. Petitioner acknowledges that the same figure appeared in a financial statement issued by the bankrupt and signed by the petitioner. Petitioner complains that he could have denied the correctness of this figure only at the risk of inviting a criminal proceeding against himself and that faced with this dilemma, he was compelled to admit the correctness of the inventory figure.

While it is true that petitioner knows best whether the bankrupt's books and records and the bankrupt's financial statement, which was signed by the appellant, were false, petitioner's present assertion as to the facts is not entitled to any weight. Obviously, even if petitioner had taken the straightforward position of testifying at the hearings that the financial statement signed by him was false, such testimony would not have been conclusive but would have created only an issue of fact. The self-serving assertion that the record and financial statement were false, made at this late date and in such manner as not to bind petitioner if it were ever sought to be used against him, presents no issue.

Petitioner's further argument that the history of the bankrupt's operations makes it "obvious that bankrupt did not have an actual inventory on hand on January 1st, 1941 of \$30,889.95" is a *non sequitur*. The bankrupt's inventory as a January 1, 1940 as shown by its records was not so disproportionate with the inventory shown as of January 1, 1941 as to cast any doubt as to the correctness of the latter. In any event, the inventory as of January 1, 1941 instead of being regulated by any laws of mathematics as petitioner seemingly contends, was wholly within petitioner's control.

Petitioner further contends that "almost 3½ years elapsed between the date when the property was claimed to be in the possession of the petitioner and the turnover order by the Referee on August 9th, 1943" (p. 7 of petition). In making this statement, petitioner has assumed that the evidence shows the original taking to have occurred prior to January 1, 1941. At page 4 of the petition, a devious argument is made to establish that the shortage could only have come out of the inventory on hand on January 1, 1941. The argument is based upon the fact that during that year sales exceeded purchases. This fact sheds no light on the date of the actual taking of the missing merchandise by the petitioner. However, there is no need to speculate as to when petitioner abstracted the missing merchandise for, after a thorough review of the evidence, the District Court held (R. 115):

"It is clear therefore that the merchandise shortage occurred in those two months, November and December, 1941, for which the bankrupt's books were in such poor shape."

The lapse of time in the instant case between the original taking and the commencement of the turnover proceedings was slightly over a year. Less than two years elapsed between the original taking and the making of the turnover order. The corresponding period in *Carter v. Jeskowitz*, No. 658, in which certiorari was denied, was 41 months.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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